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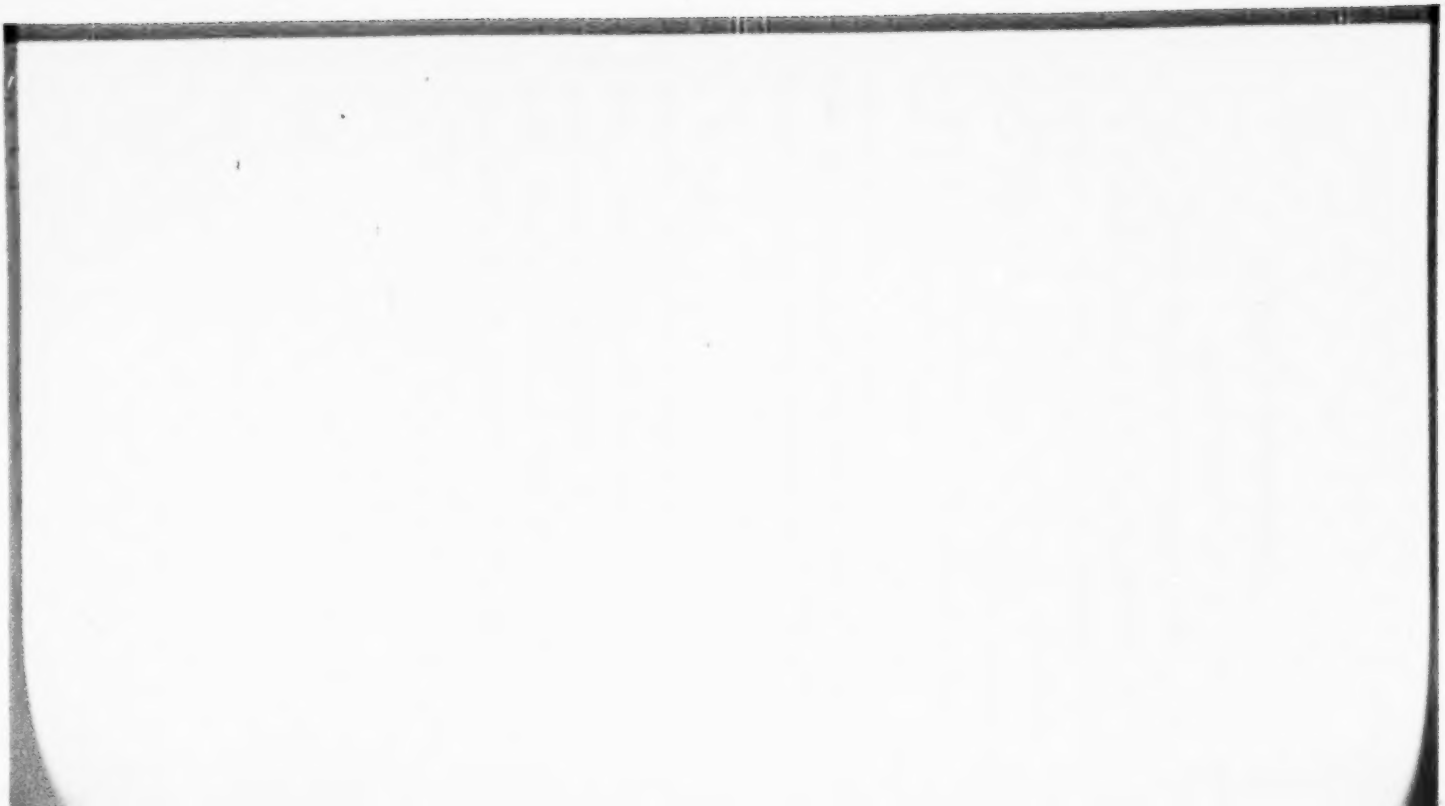

In the Supreme Court of the United States

October Term, 1971

No. .....

JAMES OSTROWSKI,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

OPINIONS AND ORDERS DELIVERED IN THE COURTS BELOW

The finding of the defendant, James Ostrowski, a minor, as a delinquent is unreported. The finding of delinquency, however, by The Cuyahoga County, Ohio, Juvenile Court has been extracted from the trial transcript and is set forth as Appendix A.

The Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District of Ohio, in an unreported memorandum to the lawyers in court dated April 29, 1971, reversed the trial court. Memorandum appended and marked as Appendix B.

The Supreme Court of Ohio, on April 26, 1972, in a reported decision, 30 Ohio St. 2nd 34, reversed the appellate court. Copy of opinion appended hereto and marked as Appendix C, and judgment, Appendix D.

JURISDICTION

Jurisdiction is invoked under 1257(3), appeal from the judgment and final order of the Ohio State Supreme Court made on April 26, 1972, and mandate of said date to the Cuyahoga County, Ohio, Juvenile Court.

THE QUESTIONS PRESENTED FOR REVIEW

(1) Where police officers wait at the home of a fifteen (15) year old juvenile for three (3) hours for his return, may they then, without benefit of a search or arrest warrant, order the parents in their own home upstairs and question the juvenile alone in the kitchen for over two (2) hours without violation to the United States Constitution?

(2) Do the parents and the juvenile who obey the orders of the police without verbal or physical objection, be deemed, thereafter, to have consented to any unlawful measures taken by such police?

(3) Where a fifteen (15) year old minor is obliged to be interrogated in the kitchen of his home for over two (2) hours during the night season, without benefit of his parents or counsel, and required during such interrogation to enter into a discussion of schizophrenia and subject himself to a diagnosis therefore by such police officers, will the taking of an exemplar in the course of such period be admissible during the trial thereof?

(4) Where a state statute entitles the parents of a minor to be present at any hearing involving the juvenile, may a trial court exclude the parents during such trial until after they have appeared and testified?

(5) Where all statements, admissions or confessions have been suppressed during a pre-trial hearing, may hearsay statements made by the juvenile to another, be ad-

mitted by a prosecution witness during re-direct examination on the prosecution's case in chief?

(6) Is a juvenile who is obliged to be tried before the same judge who had previously presided over the bind-over proceedings, motions to suppress statements, admissions or confessions and had knowledge of reports not in the evidence, denied due process of law under the Fourteenth Amendment to the Constitution of the United States?

(7) Is a juvenile who is obliged to be tried without a jury for the same offense for which an adult may be tried by a jury, denied his Constitutional Rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article One of Section Five of the Constitution of the State of Ohio?

OHIO STATE STATUTES INVOLVED

Ohio Revised Code, Section 2151.352.

"Section 2935.14 of the Revised Code shall apply to any child taken into custody. The parents, custodian, or guardian of such child, and any attorney at law representing them or the child, shall be entitled to visit such child at any reasonable time, be present at any hearing involving the child, and be given reasonable notice of such hearing.

Any report or part thereof concerning such child, which is used in the hearing and is pertinent thereto, shall for good cause shown be made available to any attorney at law representing such child and to any attorney at law representing the parents, custodian, or guardian of such child, upon written request prior to any hearing involving such child."

Ohio Revised Code, Section 2935.04—When any person may arrest.

"When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained."

Constitution of the State of Ohio, Article I, Section 5.

Trial by Jury

"The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

FACTS OF THE CASE

On Monday, the 11th day of May, 1970, at or about 7:00 P.M., Sergeants Maiotti and Lambacher, of the City of Independence, Ohio, drove their police cruiser into the driveway of the residence of Casimir and Lena Ostrowski at 6819 Brookside Road, Independence, Ohio. They were thereupon admitted into the Ostrowski residence by Mrs. Ostrowski.

Upon entry therein, Sergeant Raymond Maiotti, who was known to Mrs. Ostrowski, introduced Sergeant Lambacher and inquired as to the whereabouts of their son, James Ostrowski, then fifteen (15) years and eight (8) months of age. Mrs. Ostrowski informed the officers that he was at band practice with the Independence High School Band, and that he would be home around 10:00 P.M.

Mr. Ostrowski, who had been occupied with a siding salesman, thereupon joined the group in the living room. Thereafter, both Mr. and Mrs. Ostrowski inquired of the officers the reason for their visit. Sergeant Maiotti told them that his visit was relative to some fires which had occurred over the past (6) months in the area, specifically the fire which had taken place the day before, to-wit: The 10th day of May, 1970, at the Ventura residence, 7557 Midland Road, Independence, Ohio.

In reply to a question propounded by Mrs. Ostrowski to Sergeant Maiotto as to whether their son, James Ostrowski, was a suspect, Sergeant Maiotti replied that he was not, but, confidentially, they had a prime suspect, a girl by the name of Debby Lapka.

Until 10:00 P.M., the officers remained in the living room of the Ostrowski home. The conversation moved from Jim Ostrowski to Sergeant Maiotti's family and other topics of mutual interest, during which time Mrs. Ostrowski served the officers cold soft drinks.

Sometime before 10:00 P.M. of that evening, Sergeant Maiotti advised both parents that when Jim arrived they wanted to question him alone for the reason that children talk more freely in the absence of their parents. Jim arrived at 10:00 P.M. and was advised by his father that both officers were there to question him.

Jim was directed by Sergeant Maiotti to go into the kitchen and the parents went upstairs to their bedroom. From 10:00 P.M. until approximately 12:05 A.M., Jim Ostrowski, without interruption, was questioned by both officers relative to his whereabouts when the fires occurred, and his knowledge of schizophrenia. A handwriting exemplar was also obtained during such time.

During the entire two (2) hours which the officers spent at the Ostrowski residence, on the evening of May 11, 1970, no words of caution or warning were given to Jim's parents or to Jim, nor did the officers display an arrest warrant.

On the following day, to-wit: The 12th day of May, 1970, at or about 10:30 A.M., officers Maiotti and Lambacher appeared once again at the residence of Mr. and Mrs. Ostrowski and advised them that they had learned that Jim was a distributor of stag films. Mr. Ostrowski advised both officers that they were unaware of this fact, but they would search the house. Sergeant Maiotti informed them that they were experienced at searching and they should be permitted to search. Mr. Ostrowski agreed that they could search their residence. After a thorough search, which took more than an hour and wherein ladders were employed to search the attic, a Playboy Magazine and two (2) or three (3) magazines of stag films were uncovered. Once again, no warnings were given nor did the officers display an arrest or search warrant.

At or about 3:00 P.M. on Tuesday, May 12, 1970, Sergeant Maiotti, by telephone, advised Mr. Ostrowski to bring Jim Ostrowski to the Independence Police Station at 4:30 P.M. In accordance with such conversation, Mr. and Mrs. Ostrowski drove their son to the Independence Police Station, where they were told they would be called upon the conclusion of the interrogation. They thereupon returned home.

At or about 7:30 P.M. on said date, Mr. and Mrs. Ostrowski were advised, by telephone, to return to the police station and where they were advised by Sergeant Maiotti that their son had confessed to setting fires to

three (3) homes, however, he was vague about the details of the fires for the reason that he was a schizophrenic. Moreover, it was not their son who set the fires, but that other boy within him. At no time were warnings or words of caution given to the parents or the minor defendant during any of the episodes set forth herein.

STATEMENT OF THE CASE

On the 13th day of May, 1970, the juvenile was transported to the Juvenile Court with his parents in attendance. Sergeant Maiotti, of the City of Independence, Ohio, caused a complaint to be filed and three (3) charges to be lodged against the juvenile, namely:

1. That on or about December 25, 1969, he did unlawfully in the vicinity of 6813 Brookside Road, Independence, Ohio, wilfully and maliciously set fire to and burn an inhabited dwelling, the property of Clifford Podogil, 6813 Brookside Road, Independence, Ohio.
2. That on or about March 29, 1970, he did unlawfully, in the vicinity of 7576 Scenicview, Independence, Ohio, wilfully and maliciously set fire to and burn an inhabited dwelling, the property of Nick Vellotta, 7576 Scenicview, Independence, Ohio.
3. That on or about May 10, 1970, he did unlawfully, in the vicinity of 7557 Midland, Independence, Ohio, wilfully and maliciously set fire to and burn an inhabited dwelling, the property of Mario Ventura, 7557 Midland, Independence, Ohio.

Whereupon, the juvenile was confined and for the first time, both he and his parents were cautioned and given the necessary warnings.

Thereafter, two (2) additional charges were lodged against the juvenile by the same complainant on the 22nd day of May, 1970, namely:

4. He did unlawfully during the day season, maliciously break and enter an inhabited dwelling house, situated at 7557 Midland Road, Independence, Ohio, with the intent to commit a felony therein.

5. That on or about May 10th, 1970, he did unlawfully at 7557 Midland Road, Independence, Ohio, with intent to cause damage or injury to property, did with nail polish write on a bedroom mirror, the personal property of Mario Ventura, in violation of section 2907.082 of the O.R.C.

On the 22nd day of June, 1970, a preliminary hearing, entitled, "bind-over proceeding", was called by Judge Walter G. Whitlach and testimony concerning each fire was introduced. Bond for the juvenile was set at Ten Thousand ($10,000.00) Dollars cash or Twenty Thousand ($20,000.00) Dollars real estate.

Thereafter, counsel for the juvenile caused a motion to be filed requesting that any and all statements, confessions, admissions or handwriting specimens taken be suppressed. In accordance with said motion, a hearing was specifically set therefore on July 17, 1970, before the Honorable Walter G. Whitlach. At the conclusion of the hearing, wherein Mr. and Mrs. Ostrowski, James Ostrowski and Sergeant Maiotti testified, the trial court suppressed all the statements, admissions and confessions, but permitted the exemplar to remain. Relative to the alleged unlawful arrest, the court found:

"The court does not believe that there was an arrest made here. And I see nothing that suggests coercion or intimidation on the part of the police. They were welcomed to the home by these people. James knew the police officers. No suggestion of any coercion and, indeed, they don't, the State doesn't wish to bring out anything he may have said. I believe the only thing the State has that they want to use that came out of that interview, if we may call it that, is this handwriting exemplar. And this is not in the nature of any confession. This is more in the nature of identification rather than any utterance or statements or admissions or anything like that. So I will deny the motion to suppress the handwriting specimen. Otherwise, the motion as we originally stated is granted, is that correct, that is consisting of confessions and statements but not including the handwriting specimen."

Thereafter, to-wit: On the 27th day of July, 1970, this cause was called for trial and was heard before the Honorable Walter G. Whitlach on the 27th, 28th and 29th of July, 1970. The trial court, upon the conclusion thereof, found the juvenile a delinquent, overruled a stay of execution pending appeal and dispatched the child on the following day to an institution in Columbus, Ohio.

On the 29th day of July, 1970, an appeal was filed to The Cuyahoga County Court of Appeals, Eighth Appellate District of Ohio, wherein the following ten (10) assignments of error were alleged therein:

1. The trial court committed prejudicial error in ordering in the hearing to suppress the statements, admissions, confessions and handwriting exemplars

that the burden of proceeding was the obligation of the movant.

2. The trial court committed prejudicial error in failing to suppress the handwriting exemplars taken as the result of an invalid arrest on May 11, 1970.
3. That O.R.C. 2151.35 is unconstitutional in that it denies and deprives a juvenile of an impartial jury, in violation of the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States and Article One, Section Five of the Constitution of the State of Ohio.
4. The trial court committed prejudicial error in excluding the parents during the trial.
5. The trial court committed prejudicial error in the admission into evidence of statements of the accused before establishing the Corpus Delicti.
6. The trial court committed prejudicial error in denying the accused the right to inquire of witnesses as to their observations of December 25, 1969.
7. The trial court committed prejudicial error in admitting into evidence an admission which had been suppressed in the pre-trial hearing.
8. The trial court was guilty of an abuse of discretion in not permitting youthful witnesses called by the defense to respond to leading questions and the recall of one of the youthful witnesses.
9. The trial court committed prejudicial error in denying to the defense the right to examine his expert witness, Peter Paul Dubaniewicz.

10. That the finding and conviction of the trial court is contrary to law and manifestly against the evidence.

The Appellate Court for the Eighth Appellate District, on the 12th day of May, 1971, reversed and remanded the trial court for the reasons set forth in the memorandum to the lawyers, a copy of which is annexed hereto.

Thereupon the State of Ohio appealed to the Supreme Court of Ohio. The juvenile propounded six (6) propositions of law (Assignments of Error) some of which had not been answered by the Appellate Court and for which he prayed for relief, namely:

1. Evidence acquired as a result of investigatory detentions, however relevant and trustworthy as an item of proof, are subject to the constraints of the 4th and 14th Amendments to the Constitution of the United States of America.
2. Where a statute imposes a mandatory duty upon a trial court, discretion, established procedures or local rules of court are subordinated to such statutory mandate.
3. Where all statements, admissions or confessions have been suppressed during a pre-trial hearing, any hearsay statements admitted during trial by a prosecution witness on re-direct examination, is objectionable and prejudicial.
4. The trial court abused its discretion and committed prejudicial error in determining an art instructor, with long experience in paints and pigments, is incompetent to render an opinion as to his observations and experiments as to the properties of fingernail polish and the physical changes thereof when applied to glass with a nail polish brush.

5. A juvenile who is obliged to be tried before the same judge who had previously presided over the bind-over proceedings, motions to suppress statements, admissions or confessions and had knowledge of reports not in the evidence, is denied due process of law under the Fourteenth Amendment to the Constitution of the United States.
6. A juvenile who is obliged to be tried without a jury for the same offense for which an adult may be tried by a jury, is denied his constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article One of Section Five of the Constitution of the State of Ohio.

On the 26th day of April, 1972, the Supreme Court of Ohio reversed the Appellate Court for the Eighth District of Ohio and affirmed the trial court.

Notice of appeal to the United States Supreme Court was filed with the Ohio Supreme Court on May 12, 1972.

REASONS FOR ALLOWANCE OF WRIT

First Premise

The police acted unlawfully in effecting a seizure of the juvenile, firstly, by failing to give words of caution to the parents or juvenile before confining him in the kitchen for two (2) hours of questioning. Secondly, although the police were but some four (4) to five (5) miles from a Municipal Court, nine (9) miles from a Juvenile Court and ten (10) miles from a court of unlimited jurisdiction, which has a complement of twenty-seven (27) judges, waited three (3) hours at the home of the parents and availed themselves of their hospitality.

The trial court, in the first instance, held that because the parents welcomed the police officers and provided them with refreshments during their three (3) hour stay at the home of Mr. and Mrs. Ostrowski, the entire event was social in nature. Further, that because they didn't physically or vocally object to the instructions of the police, the parents, in effect, impliedly consented to being excluded from their kitchen while their son was being questioned, and also waived their right to words of caution. The Court of Appeals, on the other hand, felt there was a seizure and reversed the trial court; while the Supreme Court of Ohio felt otherwise and reversed the appellate court. The Supreme Court of Ohio held that because there was no evidence of an unlawful arrest and the exemplar was voluntarily given, such handwriting sample was properly admissible in evidence as a means of identification.

A reading of the transcript of the Motion to Suppress, page 38 et seq., reveals the following: Direct examination of Casimer Ostrowski: Q. Now, directing your attention, sir, thereafter, at or about what time did James Ostrowski return home? A. At about 10:00 o'clock sharp. Q. What if anything happened thereafter? A. Well, I opened the door for Jim and I informed him that Ray Maiotti and another police officer were here and they wanted to ask him some questions. Q. What happened thereafter? A. Well, may I go back a bit? Q. Yes. A. Prior to Jim's coming home, Ray Maiotti told me and my wife to go into another room while he is interrogating Jim. He says he did not want us present. I asked him, "Why, Ray? What is the difference?" And Ray said that he wanted to ask Jim some questions which he wouldn't ask in our presence.

Thereafter, the juvenile took the stand and testified relative to the following: R. 87, Transcript of Motion to Suppress. Q. About what time did this thing terminate? A. About five after 12:00. Q. How did it terminate? A. He just told me I could call my parents now. Q. James, did you have the impression that at anytime during the two-hour period that you were free to get up and leave? A. I felt I couldn't leave. Q. Why? A. Because the questions were continuous. Anyway, I couldn't leave, there wasn't a break, long pause in between. Q. Who was doing all the questioning? A. Mostly Sergeant Maiotti. And Sergeant Lambacher was writing down, plus he asked some questions, too. Q. Were you told at anytime in that room that you had a right to remain silent?

The Court: Objection sustained.

Q. Did they tell you at any time while you were in the course of that room that anything you said in that room would be used against you?

The Court: Objection sustained.

Further testimony of James Ostrowski in hearing on Motion to Suppress: Q. Now, what else happened during the course of the time that you were in this room? A. He asked me if I know what a split personality is. Q. What did you answer? A. I wasn't sure at that time. Q. Well did you have occasion to have further conversation relative to this split personality? A. Yes. A. He asked me if I know what a schizophrenic was. Q. A what? A. Schizophrenic. Q. Speak louder so we all can hear you. A. I can't pronounce the word. Q. Pronounce it the best you can. A. Schizophrenic. Q. Did you on the 11th day of May, 1970, know what a schizophrenic was? A. I had my own ideas what it was. I thought it was a person that enjoyed watching fires. Q. Did Sergeant

Maiotti, during the course of that evening, have occasion to explain to you what a schizophrenic was? A. Yes he did. Q. What did he tell you about that? A. He told me it was a person that enjoyed watching fires. Q. Did he say or did he at any time say that you were a schizophrenic? A. Not that night.

In the course of trial, Sergeant Maiotti, on cross-examination, related the following: Transcript 329: Q. Sergeant, what is schizophrenia? A. My definition of it? I would define it as a split personality. Q. And have you any special training or study relative to schizophrenia? A. No, sir. Q. And yet, isn't it a fact, that you diagnosed James as being a schizophrenic?

The Court: Objection sustained.

Q. Have you, on any occasion, made any statement that James Ostrowski was a schizophrenic? A. I used the word schizophrenia for James Ostrowski. Q. What you are saying is that you have diagnosed James as being a schizophrenic, is that true? A. I diagnosed, or I told him what the word, in my meaning was, a split personality. Q. And you told him that he had a split personality, didn't you. A. Yes, sir. Q. And you have had no psychiatric training, have you? A. No, sir. Q. From where did you obtain this information relative to schizophrenia? A. Probably in conversations. Q. And based upon all of this, that you arrived that James Ostrowski was a schizophrenic, isn't that true? A. Yes, sir.

This writ should be allowed for the reasons that it was both unreasonable and unlawful for the police, in the absence of the express consent of the occupiers of a dwelling, to take possession thereof. And thereafter, without the consent of the parents, exercise control over such home by excluding the parents from the kitchen while interrogating their son relative to the subject of schizophrenia.

Second Premise

This court has determined, that when a question arises during trial as to the propriety or admissability of evidence, the court is obliged to conduct a hearing outside the presence of the trier of the facts. Also, that a juvenile court delinquency hearing measure up to the essentials of due process and fair hearings.

In this case, the trial court, despite the fact that all admissions, statements and confessions had been suppressed, nevertheless, made the following finding in adjudging the juvenile to be a delinquent:

> "I think we would be doing James a gross disservice if, from the evidence here, for some reason other than the truth of the whole situation, I would have to make a finding that he didn't do this because I know that he knows he did it with the exception of the Velotta."

The trier of the facts, whether in a civil or criminal case, acquires only a belief as to what probably happened based upon the evidence before it. The trial judge in the case at bar speaks with regard to personal knowledge.

The juvenile's premise is that an adult who would be tried for a similar offense, would have the right as a matter of law to have his motion to suppress outside the hearing of the finders of the facts. As a matter of basic fairness, a juvenile should be accorded the same right.

Third Premise

The Legislature of Ohio, in enacting 2151.352 of the Ohio Revised Code, 133 V H 320, effective November 19, 1969, expressly provided by the mandatory language used therein, that the parents shall be entitled to be present at

any hearing involving the juvenile. The trial court and the Supreme Court of Ohio appeared to hold that the two (2) lawyers representing the child were adequate substitute for the parents, and, hence, justified their exclusion from the proceedings.

The juvenile's premise is that the trial court deprived him of a right specifically and unequivocally provided by Ohio Law to have his parents present during trial and that his lawyers are not adequate substitutes for their presence. Nor does Ohio Law provide for such substitution.

Fourth Premise

A majority of this court recently held that because a juvenile court is principally civil in nature, a jury trial was not a constitutional requirement. One of the premises of this court appears to be the reluctance to convert the juvenile process into an adversary hearing. In that connection, the case was prosecuted by two assistant county prosecutors, who are regularly assigned to the criminal docket. The atmosphere and the rules of evidence were that which are used in the Common Pleas Court, Criminal division. Both sides had occasion to resort to the use of experts in the proof and refutation of the evidence introduced by the other side. It was as hotly and emotionally tried as any capital case. After almost three (3) full days of trial, the trial court, in finding the juvenile a delinquent, had occasion to note that sometime prior to trial, it had some communication with the psychiatrists relative to the fact that the juvenile had, in fact, been guilty. Thereafter, the court implied, that despite the fact that the evidence indicated otherwise, the court would have been doing James a gross disservice to have followed the evidence.

The function of a court when it sits as the trier of the facts in whatever matter it has before it, is to make its determination based upon the evidence adduced in open Court.

For the foregoing reasons, the use of an impartial and detached fact-finding body is indispensable to the maintenance of our juvenile judicial system.

Respectfully submitted,

A. ALBERT PERELMAN
Counsel for Petitioner

APPENDIX A

Finding of Delinquency by the Juvenile Court of Cuyahoga County, Ohio

(Extracted from Trial Transcript)

No. 263,509

THE JUVENILE COURT OF CUYAHOGA COUNTY

THE STATE OF OHIO, CUYAHOGA COUNTY, SS.

IN THE MATTER OF JAMES OSTROWSKI
Believed to be a Delinquent

I too, of course, am very aware of the seriousness of this case. I had the preliminary hearing and just a brief amount of testimony put in there for a limited purpose, and from the reports I had, I decided to retain jurisdiction over this case, although I anticipated, of course, a great many problems. We have a boy not 16, and the charge is unquestionably very serious. I believe 2 to 20 years in the penitentiary is the adult penalty for arson. After hearing all this evidence, I have no difficulty in resolving this beyond a reasonable doubt, that James Ostrowski did the actions alleged in this complaint, of course with the exception of the Velotta fire which we granted the motion to dismiss on. I see a pattern running through all of these actions, and I think it is sort of a marked psychosexual pattern here. I wouldn't say that this is ultimate in depravity or anything like that, but it is a real problem in this area, and for a boy of this age. I don't quite agree with the hospital reports. That may be presumptuous of me to question a psychiatrist, but I understand they did say that their diagnosis might have been different had they known whether these charges were true or false,

and they said, of course, that James' problem was character disorder. I would rather not believe that. I don't want to set myself up to pass judgment on a psychiatrist, but after getting all of the intimate details here, getting into it very precisely, I would say that perhaps it isn't something that is as stubborn as character defect. He is not quite 16 and I would hope that his entire character isn't formed at this particular time. He is a bright boy, I am sure. I think some of them are pliable. I think we would be doing James a gross dis-service if, from the evidence here, for some reason other than the truth of the whole situation, I would have to make a finding that he didn't do this because I know that he knows he did it. And I mean the several fires, with the exception of the Velotta.

APPENDIX B

Opinion of the Court of Appeals of Cuyahoga County, Ohio

(Dated April 29, 1971)

No. 30,571

IN THE COURT OF APPEALS OF OHIO
CUYAHOGA COUNTY, EIGHTH DISTRICT

IN RE: JAMES OSTROWSKI

MEMORANDUM TO LAWYERS

This is an appeal on questions of law from the judgment of the Juvenile Court of Cuyahoga County finding the minor appellant to be a delinquent and committing him to the Ohio Youth Commission.

A police investigation during an investigation of a fire which occurred in a nearby house brought police officers to the appellant's home. After the police waited some three hours with the parents for the appellant to return home from a school event, they asked the parents to withdraw and questioned the appellant for some two hours. At this time a handwriting exemplar was taken, and no warnings required by law were given. After two further meetings between appellant and the police officers, again not in the presence of either parent and again in which it is admitted that no required warnings were given, the matter was turned over to the Juvenile Court.

After all statements made by the appellant to the police were suppressed, due to the failure of the police to give the required warnings, the matter came on for hearing on a petition alleging the setting of three separate fires,

and as to the last-occurring fire, allegations of breaking and entry in the day season and malicious destruction of property. The appellant was found delinquent on all matters except for the setting of one fire, as to which the petition was dismissed. We reverse and find four grounds for so doing in the record in this case.

In re Gault, 387 U. S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967), specifically applied *Miranda* warnings, and applied general requirements of due process to Juvenile Court proceedings, so as to prevent violations of the Fifth Amendment privilege against self-incrimination during custodial interrogations.

A handwriting exemplar may be suppressed under the Fifth Amendment if there is a special testimonial value to what is written in the exemplar. *Serao v. United States*, 390 U. S. 202, 19 L. Ed. 2d 1034, 88 S. Ct. 899 (1968), *reversing and remanding per curiam United States v. Serao*, 367 F. 2d 347 (2d Cir. 1966); *United States v. Green*, 282 F. Supp. 373 (D. Ind. 1968). Here the very words written on the mirror which had been found at the scene were included in the exemplar. The exemplar thus should have been suppressed on this ground.

Even if this were not so, the exemplar may be suppressed if it is taken under circumstances which constitute a violation of appellant's right under the Fourth Amendment and is "tainted fruit" under the exclusion doctrine of *Wong Sun v. United States*, 371 U. S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963).

The Fourth Amendment right to be secure against unreasonable searches and seizures relates to the Fifth Amendment privilege against self-incrimination, "for the 'unreasonable searches and seizures' condemned in the

Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment." *Boyd v. United States,* 116 U. S. 616, 633, 29 L. Ed. 746, 752, 6 S. Ct. 524, 534 (1886); and Mr. Justice Black's concurring opinion in *Mapp v. Ohio,* 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, 84 A. L. R. 2d 933 (1961). It would therefore be appropriate to apply Fourth Amendment protections to prevent use of evidence gained as a result of an unreasonable search and seizure in a juvenile proceeding.

Thus, whether the appellant was in custody at the time of his giving the exemplar, and whether this seizure was lawful, must be determined. In determining these questions, the relationship between the Fourth and Fifth Amendments enables us to utilize cases under either to define what constitutes custody under either Amendment.

In *Terry v. Ohio,* 392 U. S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), a momentary encounter was held subject to Fourth Amendment scrutiny. In *Orozco v. Texas,* 394 U. S. 324, 22 L. Ed. 2d 311, 89 S. Ct. 1095 (1969), interrogation in the accused's bedroom was held custodial, even though the accused was not informed that he was under arrest. We therefore find that the appellant here was in custody as a matter of law when the exemplar was taken.

In *Davis v. Mississippi,* 394 U. S. 721, 22 L. Ed. 2d 676, 89 S. Ct. 1394 (1969), detention for the sole purpose of obtaining fingerprints, without prior authorization by a judicial officer, was held invalid, and the fingerprints

subject to the exclusionary rule. The exclusionary rule was fashioned to deter overreaching by governmental authorities. *Weeks v. United States,* 232 U. S. 383, 58 L. Ed. 652, 34 S. Ct. 341 (1914); *Wong Sun v. United States, supra.* Therefore where, as here, there is a custodial interrogation, no warning of the right to an attorney, to remain silent, of the fact that anything said could be used against him, where no proper prior authorization is obtained, and where a juvenile is questioned alone, there is that kind of over-reaching which concerns the courts and calls for application of the exclusionary rule to suppress this exemplar.

Section 2151.352 of the Revised Code of Ohio, continued in effect similar language to that of Section 2151.35 by stating that "The parents, custodian, or guardian of such child, and any attorney at law representing them or the child, shall . . . be present at any hearing involving the child . . . ." Although no cases can be found construing this language, it is to be noted that the legislature has used the mandatory "shall".

It has been held that the presence of a witness in the courtroom while other witnesses are testifying does not disqualify him when he is later permitted to testify and where the court did not order a separation of witnesses. *McAllister v. State,* 13 Ohio Law Abs. 360 (Ct. App. 1932). Since an order of separation of witnesses is discretionary with the court, in view of the statute, it was error to exclude the parents from the courtroom even if they were expected to testify.

Section 2945.58 of the Revised Code of Ohio provides:

> "Whenever a defendant in a criminal cause proposes to offer in his defense, testimony to establish an alibi on his behalf, such defendant shall, not less than

three days before the trial of such cause, file and serve upon the prosecuting attorney a notice in writing of his intention to claim such alibi. Notice shall include specific information as to the place at which the defendant claims to have been at the time of the alleged offense. If the defendant fails to file such written notice, the court may exclude evidence offered by the defendant for the purpose of proving such alibi."

It would be inappropriate to apply this statute to a delinquency hearing, since this provision is stated to apply "in a criminal cause," and since juvenile proceedings are civil in nature, applying civil rules of evidence. *In re Agler,* 19 Ohio St. 2d 70, 249 N. E. 2d 808 (1969); *Cope v. Campbell,* 175 Ohio St. 475, 196 N. E. 2d 457 (1964); *State v. Shardell,* 107 Ohio App. 338, 153 N. E. 2d 510 (1958). Further, even if the provisions were to be applied, the statute does not require that the evidence be excluded. It was therefore error to exclude the testimony on this ground.

Where direct testimony as to evidence improperly obtained is suppressed, indirect testimony is also to be suppressed, unless it is shown that the evidence was also independently and properly obtained. *Wong Sun v. United States, supra.* Here, the statements made by the appellant to interrogating police officers were suppressed. Therefore, it would be improper for a witness to be permitted to testify as to information given him by one of the interrogating officers obtained from the statements which had been suppressed.

Further, the statements of the witness should be excluded as hearsay evidence. Testimony of a witness which embodies hearsay evidence should be excluded, although portions thereof might be competent if offered alone. *Root v. Monroeville,* 16 Ohio C. C. R. 617, 4 Ohio C. Dec. 53 (1894), *reversed on other grounds* 54 Ohio St. 523, 44 N. E.

237 (1896). Syllabus 3 of *McCracken v. West*, 17 Ohio 16 (1848) states, "[O]n cross-examination, a question asked of the witness by the defendant, as to what a third person told him, will not authorize the other party, upon a re-examination, to inquire what the third person, in the same conversation, said the defendant himself had told him, such evidence being hearsay."

Here, the purpose of the examination of the witness by the appellant was to determine what parts of the document admitted into evidence (Child's Exhibit B) were filled in by the witness on the basis of his own knowledge. It is not therefore material and relevant to know the source of entries other than to know whether it was or was not of the witness's own knowledge.

Therefore it was improper for the appellee to have been permitted to inquire as to the source of the information used by the witness to fill in the exhibit, much less to state the identity of the supposed perpetrator of the fire, of whom he was informed by this source.

Judgment is reversed as contrary to law and cause is remanded to the Juvenile Court for further proceedings according to law.

Exceptions. Order see journal.

DAY, C. J., WASSERMAN, J., MANOS, J. Concur.

APPENDIX C

Opinion of the Supreme Court of Ohio

(Decided April 26, 1972)

No. 71-410

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY

THE STATE OF OHIO,
Appellant,

vs.

JAMES OSTROWSKI,
Appellee.

SYLLABI:

1. A handwriting exemplar, used solely for identification purposes, is a mere identifying physical characteristic and, as such, is outside the scope of the Fifth Amendment privilege against self-incrimination, even if the words written are identical to the words contained in a writing directly linked to the crime; and there is no requirement that *Miranda* warnings be given prior to the giving of such handwriting exemplar.

2. Where there is no evidence of an unlawful arrest and no evidence that a handwriting exemplar was given involuntarily, and thus no showing of a violation of the Fourth Amendment privilege against unreasonable search and seizure, the exemplar should not be excluded from evidence as "tainted fruit."

3. If the parents of a juvenile who is the subject of a delinquency hearing in Juvenile Court are to testify at that hearing, the exclusion by the judge of the parents from the courtroom under an order for separation of witnesses until they have testified is not prejudicial, where the juvenile is represented by counsel during the hearing.

Statement of the Case.

James Ostrowski, 15 years of age, was charged in the Juvenile Court of Cuyahoga County, Ohio, with being a delinquent child, in that he willfully and maliciously set fire to and burned three separate inhabited dwellings in Independence, Ohio. After a preliminary hearing the Juvenile Court decided to retain jurisdiction.

At the hearing on the merits one of the charges was dismissed. The juvenile was found delinquent as to the other two charges and was committed to the custody of the Youth Commission of the state of Ohio.

One charge involved setting fire to the dwelling of Mr. and Mrs. Ventura on May 10, 1970. In this fire, women's underclothing was found pulled out of the dressers and two of the garments had been painted with red nail polish. The polish had also been used to print a four-word obscenity on the dresser mirror.

The other charge on which the juvenile was found delinquent involved a fire at the home of Mr. and Mrs. Podojil on December 25, 1969. Earlier, this house had been broken into and women's underclothing had been strewn about. Three days before the fire the Podojils' automobile was burned while it was parked in their garage. The juvenile lived next door to the Podojils and there was

testimony by a high school friend that the juvenile had admitted setting fire to both the house and the car.

On the evening of May 11, 1970 (the day after the Ventura fire), two police officers went to the home of James Ostrowski. One of the officers was acquainted with Ostrowski's parents, and after telling them they had come to question James, they exchanged pleasantries for three hours until James returned home from band practice at approximately 10:00 p. m. The police officers then told the parents they would like to speak to James alone, at which time the parents voluntarily went upstairs while the officers talked to James in the kitchen. The officers questioned James about the fires and requested that he give a handwriting exemplar.

By the testimony of both James (at a hearing on a motion to suppress) and the police officers, such exemplar was freely and voluntarily given. After having shown the exemplar to the parents, the officers left the Ostrowski home about midnight.

At the request of one of the officers made the next day, Mr. Ostrowski took James to the police station at 4:30 p. m. where he was interrogated, in the absence of his parents, until 7:30 p. m. Charges were then filed on May 13, 1970.

During the evening of May 11 neither the parents nor James were advised by the officers of James' constitutional rights; nor was such advice given prior to or during the May 12 interrogation. Such advice was not given until after James was "booked" at the juvenile detention home on May 13.

By amended motion to suppress, filed prior to trial, defendant sought "an order suppressing any and all evidence consisting of confessions, statements, handwriting

specimens obtained in violation of law." At the hearing on such motion, the prosecution agreed that the motion be sustained as to any statements made by James on May 11, 12 and 13, and agreed and stipulated that no such statements would be used in its "case in chief." After an evidentiary hearing, the trial court overruled that portion of the motion seeking to suppress the handwriting specimens.

James Ostrowski was found delinquent on two of the charges (the Ventura and the Podojil fires). The Court of Appeals for Cuyahoga County reversed.

The cause is here pursuant to the allowance of a motion to certify the record.

Mr. John T. Corrigan, prosecuting attorney, *Mr. Harvey R. Monck* and *Mr. Vincent Feudo,* for appellant.

Messrs. McCafferty, Perelman & Holtz and *Mr. A. Albert Perelman, for* appellee.

LEACH, J. The decision of the Court of Appeals, reversing the judgment of delinquency, set forth "four grounds for doing so on the record in this case." Essentially, the Court of Appeals held that the trial court had erred (1) in not suppressing the handwriting exemplar, (2) in excluding the parents from the courtroom until they had testified as witnesses, under an order for the separation of witnesses, (3) in the exclusion of certain testimony on the basis of noncompliance with the requirements of R. C. 2945.58, relative to notice of intention to claim an alibi, and (4) in the overruling of a motion to strike certain testimony of the Fire Chief of Independence, Ohio. On consideration of the issues presented herein, we find ourselves in disagreement with the Court of Appeals, and, thus, we reverse.

I

The Court of Appeals concluded that the handwriting exemplar should have been suppressed, both on the basis of the Fifth Amendment privilege against self-incrimination and on the basis of the Fourth Amendment privilege against "unreasonable searches and seziures." In concluding a Fifth Amendment violation, the Court of Appeals attached particular significance to the fact that the handwriting exemplar contained "the very words written on the mirror" and "thus should have been suppressed on this ground." Essentially it appears to have been the view of the Court of Appeals that the exemplar thus had a "special testimonial value," and thus was required to be suppressed in the admitted absence of any *Miranda* warnings.

In support of this premise the court cited two cases, *Serao v. United States* (1968), 390 U. S. 202, and *United States v. Green* (1968), 282 F. Supp. 373. In *Serao,* the United States Court of Appeals of the Second Circuit (367 F. 2d 347) had rejected the defendant's claim that the Fifth Amendment privilege could be a basis for excluding a handwriting specimen of the defendant, originally executed as a communicative writing but which was used solely as a handwriting standard for identification purposes and which did not communicate any information relating to the issues being tried. While, as noted in the Court of Appeals decision, the judgment of the Second Circuit Court of Appeals in *Serao* was reversed by the United States Supreme Court, its short *per curiam* opinion (390 U. S. 202) merely ordered that "the judgments of the courts below are vacated and the cases are remanded for further consideration in the light of *Marchetti v. United States,*" 390 U. S. 39.

The holding of the United States Supreme Court in *Marchetti* was *not* concerned in any way with handwriting exemplars. Instead, it held that the statutory obligations to register and to pay an occupational tax for engaging in the business of accepting wagers, as required by federal statutes, were essentially inseparable elements of a single registration procedure; that for purposes of the constitutional privilege against self-incrimination, wagering is an area permeated with criminal statutes; and thus that persons asserting the constitutional privilege against self-incrimination could not be convicted for failing to comply with these statutory requirements.

The *Green* case, *supra*, involved an action wherein the government sought a court order to compel the defendant to furnish a handwriting examplar displaying selected phrases allegedly germane to the prosecution. The United States District Court for the Southern District of Indiana refused to so order, pointing out that since the defendant was employed by the United States, the government already had samples of his handwriting available through this employment. That court attempted to disinguish the holdings of the United States Supreme Court in *Schmerber v. California* (1966), 384 U. S. 757, and *Gilbert v. California* (1967), 388 U. S. 263, upon the basis that in *Gilbert* the defendant had voluntarily given handwriting exemplars, and upon the basis, with which we are not in agreement, that "the result of requiring the accused to write his name would have the same far-reaching effect as if the accused were required to make a verbal or written admission."

In the instant case, it is admitted that the exemplar was given voluntarily. An examination of the exemplar clearly indicates that it contains nothing "testimonial" in character, and from an evidentiary standpoint it was used solely for handwriting identification purposes. While it

did contain three of the four words printed on the mirror, it also contained, on what appears to be a standard form of the detective bureau, James Ostrowski's printing of some fourteen names, three street addresses, and all of the Arabic numerals. The expert testimony, both of the prosecution and the defense, was not limited merely to a comparison of the three words which appeared both on the mirror and on the exemplar.

Schmerber, supra, at page 764, draws a distinction between "communications" or "testimony" and "that compulsion which makes a suspect or accused the source of 'real or physical evidence.'" In this connection, see the opinion of Mr. Justice Holmes in *Holt v. United States* (1910), 218 U. S. 245. That the principle announced in *Holt* and *Schmerber* is applicable to handwriting exemplars has been recognized in *Gilbert v. California, supra* (388 U. S. 263):

> "* * * The taking of the exemplars did not violate petitioner's Fifth Amendment privilege against self-incrimination. The privilege reaches only compulsion of 'an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers,' and not 'compulsion which makes a suspect or accused the source of "real or physical evidence". . . .' *Schmerber v. California,* 384 U. S. 757, 763-764. One's voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication within the cover of the privilege. A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identify-

ing physical characteristic outside its protection. *United States v. Wade, supra,* at 222-223 * * *."

In *United States v. Wade* (1967), 388 U. S. 218, 222, decided the same day as *Gilbert,* the court stated that "compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a 'testimonial' nature"; that such compulsion only required the defendant "to use a voice as an identifying physical characteristic, not to speak his guilt."

We conclude, therefore, that a handwriting exemplar, used solely for identification purposes, is a mere identifying physical characteristic, and as such is outside the scope of the Fifth Amendment privilege against self-incrimination—even if the words written are identical to the words contained in a writing directly linked to the crime. Further, there is no requirement that *Miranda* warnings be given prior to the giving of such a handwriting exemplar.

In the instant case, as heretofore noted, the Court of Appeals did not rely solely upon a claimed violation of the Fifth Amendment privilege as a basis for its holding that the handwriting exemplar should have been suppressed. It also found that the exemplar was taken under circumstances which constituted a violation of the Juvenile's Fourth Amendment rights against "unreasonable searches and seizures"; thus, that the exemplar should have been suppressed as "tainted fruit" under the exclusionary doctrine of *Wong Sun v. United States* (1963), 371 U. S. 471. In *Wong Sun,* the United States Supreme Court held that any evidence obtained as a product of an unlawful arrest constitutes tainted "fruit" thereof and thus must be excluded from evidence.

In *Davis v. Mississippi* (1969), 394 U. S. 721, the Supreme Court held that detention for the sole purpose of obtaining fingerprints and without any probable cause for arrest or detention, constituted an unreasonable seizure of the person in violation of the Fourth Amendment, and thus that fingerprints so obtained were inadmissible at trial as "tainted fruit" of the unlawful arrest. Thus the *Davis* case stands for the proposition that even mere "identifying physical characteristics," such as fingerprints and handwriting exemplars, may be viewed as "tainted fruit" under the exclusionary doctrine, if such is the product of an unreasonable search or seizure.

In the instant case, however, there was no evidence of an unlawful arrest and no evidence that the handwriting exemplar was given involuntarily. Thus, there was no showing of a violation of the Fourth Amendment privilege against unlawful search and seizure, and thus no basis for excluding the exemplar as being "tainted fruit" resulting from such a violation.

Here, the record shows that the juvenile was not detained unlawfully, but instead was questioned in his own home under circumstances which indicate that no arrest, either lawful or unlawful, was made at that time.* As

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*The following testimony of the juvenile on the motion to suppress is particularly relevant on the issue of "unlawful arrest":

"Q Now, did the officer ever indicate to you that you were under arrest?

"A Never told me but it just seemed like it.

"Q You just felt you were under arrest?

"A Yes, I did.

"Q And you must have been pretty surprised when he didn't take you down to the station that night then?

"A Could you repeat that?

"Q I say you were surprised then that he didn't take you right out of the house to the station, weren't you?

"A He couldn't, I wasn't surprised because there wasn't any proof. They didn't have any proof so, that I did the fires or anything.

(*Continued*)

heretofore noted, by the testimony of the juvenile himself, he gave the handwriting exemplar freely and voluntarily. As a result, we find no basis for exclusion of the handwriting exemplar, under either the Fourth or the Fifth Amendment.

II

The second ground for reversal relied upon by the Court of Appeals was that the trial court had erred in excluding the parents from the courtroom, under an order for the separation of witnesses. Here, reliance is had upon that sentence of R. C. 2151.352 which provides that "the parents, custodian, or guardian of such child, and any attorney at law representing them or the child, shall be entitled to visit such child at any reasonable time, be present at any hearing involving the child, and be given reasonable notice of such hearing."

Taken as a whole, the purpose of R. C. 2151.352 is to insure to the juvenile his right to counsel and/or his right to have his parents present at any hearing. In our opinion, such a provision is not intended to and does not take away from a trial court its basic right to order a separation of *witnesses* until such time as such witnesses have testified. During such time the exclusion is not of parents, as such, but instead is the exclusion of witnesses.

"Q So you weren't surprised that they didn't take you to the station? You were not surprised?
"A I was not.
"Q And you knew they couldn't take you to the station because they had no proof?
"A Right.
"Q Do you know what proof they had?
"A On Monday you mean?
"Q Yes.
"A Not any that I knew of on Monday."

In denying the motion to suppress the handwriting, the trial judge stated that he did "not believe that there was an arrest made here."

Moreover, during such time as the parents were so excluded, the juvenile was fully and adequately represented by two attorneys. Under these circumstances, no possible prejudice to the juvenile could result from such exclusion.

III

The Podojil fire took place on December 25, 1969. It appears that everything was in order at the home when Mrs. Podojil left at approximately 8:00 p. m., and she received a telephone call notifying her of the fire approximately 45 minutes later.

By way of defense, both Mr. and Mrs. Ostrowski and a Mr. and Mrs. Seitz, who were visitors at their home that day, testified that James was home.

The trial court sustained certain objections to questions propounded to both Mr. and Mrs. Seitz, but none of these objections were sustained upon the basis of any requirements of R. C. 2945.58. The basis of the sustaining of such objections, in each case, appears to have been the failure of the witness to testify as to the times during that day when he or she had actually seen James, before being permitted to testify in general language as to whether they had any knowledge of James being absent from the home.

A careful examination of the testimony of the four witnesses as to "alibi" that day, Mr. and Mrs. Ostrowski and Mr. and Mrs. Seitz, reveals that the court, by its rulings, did not preclude any proper testimony, and no reference was ever made to any requirement of written notice of alibi.

In its brief in the Court of Appeals, the prosecution, for the first time, made reference to R. C. 2945.58, claim-

ing, as an additional argument, that since none of the Seitz's testimony was in compliance with the requirements of that statute, there could be no error in excluding any of it in any event.

Observing that R. C. 2945.58 requires "a defendant in a criminal cause" to give notice in writing of his intention to claim an alibi, the Court of Appeals concluded that the requirements of this statute are not applicable to juvenile proceedings, and that "it was therefore error to exclude the testimony on this ground."

An examination of the record, however, clearly indicates that no testimony was excluded "on this ground."

IV

The fourth ground for reversal, relied upon by the Court of Appeals, concerned certain testimony by the Fire Chief, elicited on redirect examination and relating to the basis of information contained in his official report. At the time such testimony was given the report had been introduced in evidence by the defense, and the witness had been interrogated by defense counsel as to certain check marks placed thereon as to the sex and age bracket of the person who "caused" such fire. The prosecution then questioned the Fire Chief concerning the source of the information which caused him to enter such check marks, whereupon the Fire Chief, in effect, stated that he knew about James Ostrowski and that "he [Officer Maiotti] told me he did it."

The trial court, in overruling the objection of the defense, concluded that counsel had "opened the door"; that the line of questions was directed to show that there was "somebody else"; that the Fire Chief "had another suspect that hasn't been mentioned here"; and that the

evidence indicating that James Ostrowski was the 15-to-18-year-old male referred to in the report, therefore became admissible.

We agree with the trial court that the line of questions pursued by counsel for the defense did "open the door" for an explanation by the Fire Chief as to the basis for his information in filling out that portion of the report as to which he had been specificially subjected to examination by defense counsel.

In any event, from an examination of the entire record, this single bit of evidence cannot be considered as being actually prejudicial.

We conclude, therefore, that the Court of Appeals erred in reversing the judgment herein.

In addition to the bases for reversal relied upon by the Court of Appeals, it is claimed on behalf of the juvenile (although no cross-appeal was filed) that the judgment of the trial court is also subject to reversal on other bases. We conclude that there is no merit to these claims, one of which is that a juvenile has a constitutional right to trial by jury. Such a claim has been specifically rejected by the United States Supreme Court in *McKeiver v. Pennsylvania* (1971), U. S. , 29 L. Ed. 2d 647.

For the reasons stated, the judgment of the Court of Appeals is reversed.

Judgment reversed.

O'NEILL, *C. J.*, SCHNEIDER, HERBERT, CORRIGAN and STERN, *JJ.*, concur.

BROWN, *J.*, dissents.

APPENDIX D

Judgment of the Supreme Court of Ohio

(Decided April 26, 1972)

No. 71-410

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY

THE STATE OF OHIO,
Appellant,

vs.

JAMES OSTROWSKI,
Appellee.

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed for the reasons stated in the opinion filed herein;

It is ordered and adjudged also that appellant recover from appellee its costs expended in this Court; that a mandate be sent to the Juvenile Court of Cuyahoga County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

In the Supreme Court of the United States

October Term, 1971

No. 71-108

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Supreme Court, U.
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MICHAEL RODAK, JR.,

JAMES OSTROWSKI,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*
HARVEY R. MONCK,
Assistant Prosecuting Attorney
VINCENT FEUDO
Assistant Prosecuting Attorney
Criminal Courts Building
1560 East 21st Street
Cleveland, Ohio 44114
Attorneys for Respondent

A. ALBERT PERELMAN
McCAFFERTY, PERELMAN & HOLTZ
1248 Engineers Building
Cleveland, Ohio
Attorney for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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In the Supreme Court of the United States

October Term, 1971

No. 71-108

JAMES OSTROWSKI,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

The State Court has not decided a federal question of substance not theretofore determined by this Court, nor has the State Court decided any question in a way not in accord with applicable decisions of this Court. No real or substantial federal question is involved herein.

QUESTIONS PRESENTED

Respondent submits that the questions presented by the record in this case are more properly stated as follows:

1. Is handwriting exemplar, used solely for identification purposes, a mere identifying physical characteristic and, as such, outside the scope of the Fifth Amendment privilege against self-incrimination, even if the words written are identical to the words contained in a writing directly linked to the crime; and are *Miranda* warnings required be given prior to the giving of such handwriting exemplar?

2. Where police officers investigating arson desire to question a juvenile alone in his home and his parents voluntarily absent themselves from the particular room, and in the course of the questioning the juvenile voluntarily gives them a handwriting exemplar, and there is no evidence that the juvenile was under arrest, should the exemplar be excluded from evidence as "tainted fruit"?

3. Whether at a hearing before the juvenile court, where the juvenile is represented by two attorneys, any constitutional privilege of the juvenile is violated by the exclusion of his parents from the courtroom, under an order for separation of witnesses, until such time as they have given their testimony as witnesses supporting a claimed alibi?

HISTORY OF THE CASE

James Ostrowski, fifteen years of age, was charged in the Juvenile Court of Cuyahoga County, Ohio, with being a delinquent child in that he willfully and maliciously set fire to and burned three separate inhabited dwellings in Independence, Ohio. At a preliminary hearing the Juvenile Court decided to retain jurisdiction.

At the hearing on the merits one of the charges was dismissed. As to the other two charges, the juvenile was found delinquent and was committed to the legal custody of the Youth Commission of the State of Ohio. The Court of Appeals, Eighth District, reversed and remanded, in a Memorandum to Lawyers dated April 17, 1971. The Supreme Court of Ohio reversed, *State v. Ostrowski*, 30 Ohio St. 2d 24 (April 26, 1972).

STATEMENT OF THE CASE

One of these two charges involved setting fire to the dwelling of Mr. and Mrs. Ventura at 7557 Midland Road, Independence, Ohio, on May 10, 1970. The other delinquency finding involved setting on fire the home of Mr. and Mrs. Podojil at 68 Brookside Road, Independence, Ohio, on December 25, 1969. Both were set fires of incendiary origin. Each fire had the earmarks of an aberrant psychosexual. While the physical and psycho-sexual characteristics of both fires were similar, the evidence of criminal agency in each fire was entirely different and the facts in each required separate and distinct applications of law.

The Podojil Fire.

Mrs. Podojil testified that on Christmas Day, 1969, her family was at home all day except for about an hour

in the evening when they were away. They left the home about 8:00 p.m. When they returned at 9:00 p.m., their home was in flames (R. 36, B.E. 215).

Mrs. Podojil kept an extra key on the outside for the use of her daughter (R. 36, B.E. 213). (There was also testimony that James Ostrowski stated to a police officer that he was good friends with the Podojils and while they were building the home he knew where they had the keys placed to get into the house, and he also stated that he knew that they had a key hidden outside the rocks in front of the house at the time of the fire.)

The Ostrowskis lived next door to the Podojil home.

In describing an earlier break-in, Mrs. Podojil testified that nothing was disturbed in the home except her clothing, which had been thrown about the bedroom. She said, "My underclothing had been taken out of the bedroom drawer." Her husband's clothing was taken out of the drawers but, unlike her garments, it was not strewn about. Instead it was "laid on the bed in a pile of folded up clothing" (R. 39, B.E. 227). Her daughter's clothing also was disturbed, thrown about the bedroom. Some of the underthings were out in the bedroom hallway. She also testified that the youth herein, James Ostrowski, had been at her residence during the day of the fire (R. 38-39, B.E. 219) and had knowledge of where the Podojil family would be that evening (R. 40, B.E. 233).

The criminal agency as to the fire at the Podojil's was established through the testimony of Thomas Bokmuller, who testified that the defendant, James Ostrowski, had told him that, "Well, James told me that he had lit the Podojil house afire and also the car" (R. 30, B.E. 49). He said, "Well, he stated that he lit the sleeve of a coat in the closet and the bedspread." Bokmuller was fifteen years of age, in the tenth grade at Independence High

School, and a friend of James Ostrowski, having known James three years (R. 28, B.E. 10).

The Ventura Fire.

On May 10, 1970, the Ventura home on Midland Road in Independence was set on fire while the members of the family were away. Mrs. Ventura's mother testified that her clothing was pulled out of her dresser and thrown on the floor, and that on top of her dresser was a bra, the tips of which were painted red with nail polish (R. 43, B.E. 258). She also observed that the leg part of her underclothing was painted. Two hundred dollars in bills in her dresser drawer was not touched. Upon the mirror of her dresser four-letter obscenities had been scribbled with nail polish (R. 42-43, B.E. 257). The alarm was received by the Independence Fire Department at approximately 6:45 p.m. on the evening of the 10th.

Fire Captain James Waters, an arson expert, examined the premises after the fire. His examination disclosed ten separate and unconnected "points of origin". The separate points of origin indicated that the fires "were set" (R. 47, B.E. 299). Captain Waters also found that the bedroom dresser drawers had been pulled out and emptied on the floor at the base of the bed (R. 45, B.E. 298). It was his opinion that it was a set fire (R. 48, B.E. 305). The fire was set by piling clothes on the floor and lighting them and edges of bedspreads being ignited in several rooms of the house.

Sergeant Maiotti, who at this time was investigating a series of fires in Independence, visited the Ostrowski home on the evening of May 11, 1970 to ask a few questions of James and obtain a handwriting exemplar, as had already been done with several other youths in the area.

Maiotti was accompanied by Sergeant Lambecker of the Independence Police Department.

The handwriting exemplar James Ostrowski gave the officers was subsequently submitted to Joseph Tholl, a document examiner well known in the Cleveland area, along with other handwriting exemplars and pictures of the mirror with the obscenities written thereon obtained from the Ventura residence. Mr. Tholl's findings were that the writing on the Ostrowski exemplar and that on the mirror were made by the same hand, that of James Ostrowski. As a matter of fact, Mr. Tholl subsequently testified that according to his findings there was only a one in a billion chance that the writing on the mirror was not that of James Ostrowski.

Defense Testimony.

Casimir Ostrowski, the father of the juvenile, testified that Sergeant Maiotti of Independence Police Department came to their home and asked them if he might ask James some questions (R. 54, 55, B.E. 435, 437). He said, "Well, my wife and I left the room and Sergeant Maiotti and Sergeant Lambecker took my son into the kitchen."

Under cross-examination Mr. Ostrowski testified he did not specifically object to Sergeant Maiotti interrogating his son outside his presence (R. 59, B.E. 451). He said, "I had no objection to Mr. Maiotti questioning my son" (R. 59, B.E. 452).

Both parents testified that James was at home at the time of both fires.

Motion to Suppress.

The defense submitted a pre-trial motion to suppress any statements made by the juvenile to the police officers

and to suppress the handwriting specimens. The motion was based upon alleged violations of the *Miranda* warnings. The court granted the motion to suppress the statements and overruled it as to the handwriting specimen.

Pertaining to the handwriting specimen, Sergeant Maiotti of the Independence Police Department testified that he visited the Ostrowski home and asked the defendant's parents to allow him "to obtain a handwriting specimen—that he would like to question the defendant alone" (R. 9, B.E. 26-27). His parents agreed and went upstairs. Maiotti and Lambecker then proceeded to question the youth as they sat in the kitchen (R. 11-30, B.E. 18-51). During the course of the questioning Ostrowski consented to giving Sergeant Maiotti a handwriting exemplar which was done (R. 25, B.E. 99-100). The questioning lasted from 10:00 p.m. until approximately midnight, when the parents were called downstairs and Maiotti and Lambecker left (R. 10, B.E. 29-30, R. 19, B.E. 56). The court observed that the questioning was in the defendant's own home with his parents' permission.

Casimir Ostrowski, the juvenile's father, testified that Sergeant Maiotti came to his home and said that he wanted to question James (R. 13, B.E. 36) and that they took him into the kitchen (R. 15, B.E. 39). After talking to James alone, the sergeant showed him a specimen of the defendant's handwriting (R. 16, B.E. 40). Mr. Ostrowski testified that while the sergeant was questioning James in the kitchen the parents went up to their bedroom upstairs. The parents did not object to the questioning of their son by the officer (R. 16, B.E. 46). The father testified (R. 17, B.E. 50):

> "Actually Sergeant Maiotti asked me, told me that he wanted to take James' handwriting and I asked him what for. Sergeant Maiotti said, 'Just for a compari-

son. I am taking all of the kids' handwriting examples.' "

Mr. Ostrowski further testified that he made no comment when the officer asked to take a specimen of his son's handwriting. At (R. 18, B.E. 1) the following appears:

"Q. So you knew what the officer wanted as to getting, I mean you knew what he wanted to get, a handwriting sample from your son, is that right?

A. Yes.

Q. Then apparently you indicated that the officer said that he would prefer to talk with your boy alone, is that the gist of it, anyway?

A. Yes, sir.

Q. All right. And what did you say on that, 'Well, no, I would like to be there,' or 'I don't care,' or what, would you give your response to that? Did you deny them the right to talk to your son alone?

A. Again, I did not deny.

Q. I see. Now, when you went, when they went into the kitchen, where did you go, if anyplace?

A. My wife and I went upstairs.

Q. For any particular reason?

A. Because Sergeant Maiotti ordered us to go upstairs. No, sir, I beg your pardon, I will take that back."

(R. 18-19, B.E. 52):

"Q. And he didn't tell you to go upstairs, though, you chose to go upstairs now?

A. Yes."

Lena Ostrowski testified that the officers suggested that they wanted to question her son alone (R. 20, B.E. 75). The following questions and answers then appear:

"Q. Did you ask to be in the room with your son?

A. No, I did not ask.

Q. And your husband, neither did he ask to be in the room?

A. He did not.

Q. And at any point did you try to go in the kitchen to be there with the two officers?

A. No, we did not.

Q. And so that you were never denied, you never tried to get in there and they said, 'No, don't come in,' that never happened, did it?

A. No, that didn't happen."

When questioned about the handwriting specimen, James Ostrowski himself said that when he made the specimen for the officer he had no reason not to fill it out. The following questions and answers appear (R. 25, B.E. 100-101):

"Q. You would have no reason not to fill it out, would you?

A. That is right. That is why I filled it out.

Q. And you weren't even reluctant to fill it out, were you?

A. No, I was not.

Q. You filled it out readily and this is your printing and handwriting in the various places?

A. Yes, it is."

Separation of Witnesses.

At the beginning of the preliminary hearing counsel for the defense moved for a separation of witnesses (R. 5, B.E. 3). This motion was granted by the trial court. After the testimony on the pre-trial motions had concluded at first the defense moved that the "parents be present during the course of the entire proceedings" but later made no

objection and apparently acquiesced when the court observed that the record may show that the defense counsel is requesting a separation of witnesses along with the prosecutor. The following appears at (R. 26-27, B.E. 4-5) in the trial proceedings:

> "The Court: Will everyone except James Ostrowski and Sergeant Maiotti and the first witness who is going to testify, please step outside the courtroom and wait until they are called.
>
> Mr. Perelman: May the parents stay?
>
> The Court: If they are going to be witnesses it is rather unusual.
>
> Mr. Perelman: Permit me to put it on a formal basis. I move that the parents be present during the course of the entire procedure.
>
> Mr. Suster: I have no objection as long as they won't testify.
>
> Mr. Perelman: They will testify.
>
> Mr. Suster: Then I object. If they are going to testify—
>
> The Court: I inquired and counsel told me he did want a separation of witnesses.
>
> * * * * *
>
> Mr. Perelman: For the record, is the Court overruling this?
>
> The Court: That is right. As long as the parents are going to be witnesses—I certainly concede their right to be here, if they weren't going to testify.
>
> I am certain the record can show that Mr. Perelman is requesting a separation of witnesses along with the Prosecutor."

At (R. 64, B.E. 516) the following appears:

> "The Court: They have a perfect right to be here. Ordinarily, the parents would be entitled to be

here with the child, but inasmuch as they were going to be witnesses and there was a separation of witnesses requested, we excused them."

REASONS FOR REFUSING THE WRIT

1, 2. The petition herein contains certain misstatements of fact and irrelevant matters not reflected in either the printed record or the bill of exceptions. For example, the record nowhere shows that the police officers "took possession" of the Ostrowski home or exercised any control over it. On the contrary it does disclose that the parents voluntarily removed themselves to the upstairs while the officers were questioning the son. James Ostrowski willingly talked with the officers and freely and voluntarily gave them the handwriting exemplar.

Petitioner sets forth an excerpt from the testimony involving the discussion of schizophrenia by the officer and the juvenile. (This testimony is not in the printed record.) In any event, it could never provide a basis for concluding that Ostrowski's conversation with the officers was in any way coerced or that there was any compulsion in the giving of the handwriting exemplar.

The opinion of the Supreme Court of Ohio reversing the decision of the Court of Appeals sets forth the following facts with respect to the handwriting exemplar:

> "In the instant case, it is admitted that the exemplar was given voluntarily. An examination of the exemplar clearly indicates that it contains nothing 'testimonial' in character, and from an evidentiary standpoint it was used solely for handwriting identification purposes. While it did contain three of the four words printed on the mirror, it also contained, on what

appears to be a standard form of the detective bureau, James Ostrowski's printing of some fourteen names, three street addresses, and all of the Arabic numerals. The expert testimony, both of the prosecution and the defense, was not limited merely to a comparison of the three words which appeared both on the mirror and on the exemplar."

The opinion summarizes the Fifth Amendment position of the Court of Appeals as follows:

"The Court of Appeals concluded that the handwriting exemplar should have been suppressed, both on the basis of the Fifth Amendment privilege against self-incrimination and on the basis of the Fourth Amendment privilege against 'unreasonable searches and seizures.' In concluding a Fifth Amendment violation, the Court of Appeals attached particular significance to the fact that the handwriting exemplar contained 'the very words written on the mirror' and 'thus should have been suppressed on this ground.' Essentially it appears to have been the view of the Court of Appeals that the exemplar thus had a 'special testimonial value,' and thus was required to be suppressed in the admitted absence of any *Miranda* warnings."

The Ohio Supreme Court, however, relied on the distinction drawn in *Schmerber v. California*, 384 U.S. 757, between "communications" or "testimony" and "that compulsion which makes a suspect or accused the source of 'real or physical evidence'" and applied to handwriting exemplars in *Gilbert v. California*, 388 U.S. 263.

The Ohio Court concluded, therefore, that a handwriting exemplar, used solely for identification purposes, is a mere identifying physical characteristic, and as such

is outside the scope of the Fifth Amendment privilege against self-incrimination—even if the words written are identical to the words contained in a writing directly linked to the crime. Further, there is no requirement that *Miranda* warnings be given prior to the giving of such a handwriting exemplar.

In overturning the Fourth Amendment basis for reversal—that the exemplar should have been suppressed as "tainted fruit" under the exclusionary doctrine of *Wong Sun v. United States*, 371 U.S. 471,—the Ohio Supreme Court upheld the trial court's determination that no arrest, either lawful or unlawful, was made at the time the juvenile was questioned in his own home. The opinion also notes that the testimony of the juvenile himself was that he gave the handwriting exemplar freely and voluntarily.

In the circumstances of this case, the refusal to suppress the handwriting exemplar does not provide any basis for Fourth Amendment or Fifth Amendment review by the Court.

3. Petitioner's third premise is concerned with the application of an Ohio Statute, Section 2151.352, Ohio Revised Code, granting to the parents of a juvenile the right to be present at any hearing and with a claimed abuse of discretion by the trial court when he ruled that the parents as prospective witnesses in juvenile court were subject to the order granting a separation of witnesses.

The Ohio Supreme Court has stated that the purpose of this statute is to insure to the juvenile his right to counsel and/or his right to have his parents present at any hearing. In this opinion of the Court, such a provision is not intended to and does not take away from a trial court its basic right to order a separation of *witnesses* until such time as such witnesses have testified. During

such time the exclusion is not of parents, as such, but instead is the exclusion of witnesses.

The Ohio Supreme Court held further: "Moreover, during such time as the parents were so excluded, the juvenile was fully and adequately represented by two attorneys. Under these circumstances, no possible prejudice to the juvenile could result from such exclusion."

No infringement upon any constitutional right of the juvenile entitling him to review by this Court is presented by these circumstances.

Under the heading "Second Premise" petitioner argues that the trial court prejudged the case and to support this premise petitioner quotes the last sentence from the juvenile judge's finding of delinquency as follows (p. 16):

> "I think we would be doing James a gross disservice if, from the evidence here, for some reason other than the truth of the whole situation, I would have to make a finding that he didn't do this because I know that he knows he did it with the exception of the Velotta."

Under "Fourth Premise" petition reverts to the same subject and there claims that the court implied that "despite the fact that the evidence indicated otherwise, the court would have been doing James a gross disservice to have followed the evidence." That is precisely the opposite of what the court was saying.

In *McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L.Ed.2d 647, specific mention is made of concerns which might create the likelihood of prejudgment by the juvenile judge. The Court dismisses them as ignoring "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates."

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by the Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*

By HARVEY R. MONCK
Assistant Prosecuting Attorney
and
VINCENT FEUDO
Assistant Prosecuting Attorney
Attorneys for Respondent